

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1299

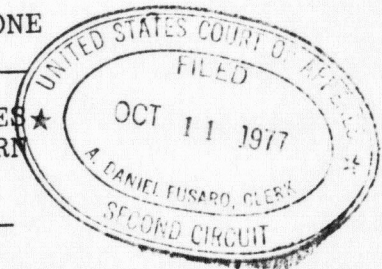
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1299

UNITED STATES OF AMERICA,
Appellee,
-against-
Esau Solone
Appellant.

APPENDIX FOR APPELLANT ESAU SOLONE

ON APPEAL FROM THE UNITED STATES ★
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK



VICTOR L. BRIZEL, ESQ.
Attorney for Appellant
79 Madison Ave.
New York, New York 10451
(212) 684-6088

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

APPENDIX

	PAGE
Docket Entries.....	1a
INDICTMENT.....	5a
DISTRICT COURT DOCKET, ETC.....	11a
COMPANION CASE INDICTMENT.....	16a
TRIAL INSTRUCTIONS.....	20a
COURT'S CHARGE.....	23a
COURT'S SUPPLEMENTAL CHARGE.....	35a

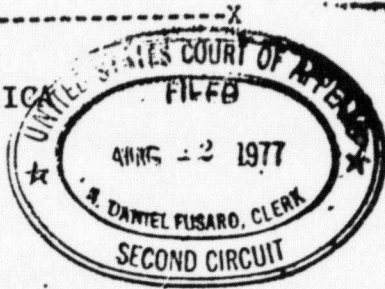
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

U.S.C.A. NO. 77-8259

UNITED STATES OF AMERICA

-v-

ESAU SOLONE



U.S. DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

CASE NO. 77 Cr 62

JUDGE Tenney

1st SUPPLEMENTAL RECORD

INDEX TO THE SUPPLEMENTAL RECORD ON APPEAL

DOCUMENTS

Certified extract of docket entries

C

Transcript record of proceedings dtd: Feb 9, 1977 10

Clerk's Certificate

11

77-8259

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DOCKET ENTRIES

2a

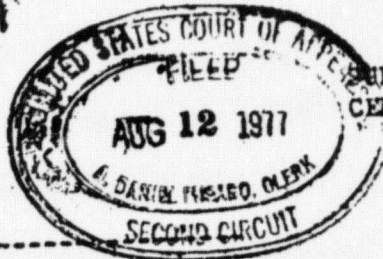
UNITED STATES OF AMERICA

CASE NO. 77 Cr 62

JUDGE Tenney

-v-

ESAU SOLONE



SUPPLEMENTAL CLERK'S
CERTIFICATE.

I, RAYMOND F. BURGHART, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the certified extract of docket entries lettered C, and the original filed papers numbered 10 thru 11, inclusive, constitute the supplemental record on appeal in the above entitled proceeding.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 11th day of August, in the year of our Lord, one thousand nine hundred and seventy seven, and the Independence of the United States the 202nd year.

Raymond F. Burghart
Clerk of the Court.

BEST COPY AVAILABLE

DOCKET ENTRIES

3a

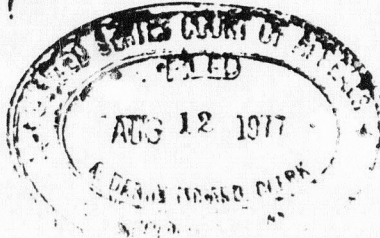
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S.C.A. NO. 77-8259

UNITED STATES OF AMERICA

-v-

ESAU SOLONE



CASE NO. 77 Cr 62

JUDGE Tenney

EXTRACT OF DOCKET ENTRIES

DATE

8-11-77

PROCEEDINGS

Filed transcript record of proceedings dtd:
Feb 9, 1977

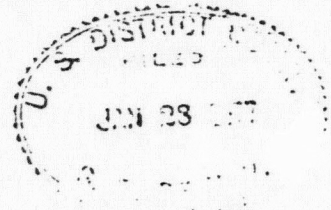
77-8259
100

I HEREBY ACKNOWLEDGE RECEIPT
OF THE CERTIFIED COPY OF DOCKET
ENTRIES, INDEX AND 2 VOLS
VOLUMES OF ORIGINAL RECORD.

DATE: August 77
A. DANIEL FUSARO
CLERK, U.S.C.A., 2nd CIR.

Miriam Jones
Asst Clerk

BEST COPY AVAILABLE

JP:cmw
01-12-4UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

-v- :

INDICTMENT

ESAU SOLOME and
PAUL SULLIVAN, a/k/a "PABLO," :

77 Cr. (CHT)

Defendants. :

77 CRIM. 0082

COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of January, 1976 and continuously thereafter up to and including the date of the filing of this Indictment, in the Southern District of New York, ESAU SOLOME and PAUL SULLIVAN, a/k/a "Pablo," the defendants and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

MICROFILM

JAN 24 1977

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JP:emw
01-12/44

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. On or about April 27, 1976, ESAU SOLONE and another individual drove to 117th Street and 5th Avenue, New York, N.Y. and entered the Rainbow Inn Bar, 1428 5th Avenue, New York, N.Y.
2. On or about April 27, 1976, ESAU SOLONE and PAUL SULLIVAN, a/k/a "Pablo," had a meeting in the Rainbow Inn Bar, 1428 5th Avenue, New York, N.Y.
3. On or about April 27, 1976, ESAU SOLONE and PAUL SULLIVAN, a/k/a "Pablo" entered the R&B Delicatessen, 3 West 116th Street, New York, N.Y.
4. On or about April 27, 1976, at 117th Street and 5th Avenue, New York, N.Y. ESAU SOLONE handed another individual approximately 67.8 grams of heroin.
5. On or about June 2, 1976, ESAU SOLONE met another individual at the Interchange Cocktail Lounge, 172-04 Linden Boulevard, Saint Albans, N.Y. and handed that individual approximately 25.2 gram of heroin.
6. On or about June 23, 1976, ESAU SOLONE entered the R&B Delicatessen, 3 West 116th Street, New York, N.Y.
7. On or about June 23, 1976 ESAU SOLONE and PAUL SULLIVAN, a/k/a "Pablo," met at the Rainbow Inn Bar, 1428 5th Avenue, New York, N.Y.
8. On or about June 23, 1976, ESAU SOLONE, PAUL SULLIVAN, a/k/a "Pablo" and another individual drove to Taylor and Westchester Avenues, Bronx, New York.
9. On or about June 23, 1976, ESAU SOLONE and PAUL SULLIVAN a/k/a "Pablo" handed another individual approximately 141.5 grams of heroin hydrochloride.

(Title 21, United States Code, Section 346).

JP:mr
01-1244

COUNT TWO

The Grand Jury further Charges:

On or about the 27th day of April, 1976, in the Southern District of New York, ESAU SOLONE and PAUL SULLIVAN, a/k/a "Pablo," the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 67.8 grams of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), Title 18, United States Code, Section 2.)

JP:mr
01-1244

COUNT THREE

The Grand Jury further charges:

On or about the 23rd day of June, 1976, in the Southern District of New York, ESAU SOLONE and PAUL SULLIVAN a/k/a "Pablo" the defendants, unlawfully, intentionally and knowingly did distribute and posses with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 141.5 grams of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), Title 18, United States Code, Section 2.)

Robert D. Healy
FOREMAN

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

4-19-77 BEFORE TENNEY, J., JURY TRIAL BEGUN
ASTO DEFT. SOLONE.

4/20/77 - trial Part I

4/24/77 - trial Part I. Deft found guilty
on each of Counts 1, 2 & 3. The Court
investigation ordered. Deft adj. &
until 5/16/77 at which
Deft remanded on bond of bail
fixing the sum of \$40,000.
Tenney J.

5-27-77 (Esau Solone. (atty and deft present) Sidney Craig, Esq.

deft sent to 4 years, on each of cts 1, 2 & 3 to run ~~concurrent~~ concurrent
with each other. Pursuant to the provisions of Title 21, Section 841,
Code, the deft is placed on Special Parole for a period of 3 years, to
commence upon expiration of confinement. Tenney, J.

6/6/77 - Paul Sullivan - (atty & deft present -
Paul Goldberger, &

Deft sent to (3) years, on each of Counts
One & Two to run concurrently with
others. Pursuant to the provisions of Title
21, Sec. 841, Code, the deft is placed on
Special Parole for a period of (3) years
to commence upon expiration of
confinement - of these (3) is to be
on motion of deft's counsel with
consent of the Government.

Deft's bond is continued on his present
bail until June 20, 1977 at which
he is to surrender by 10 AM, to the
Marshal, room 506, to commence
off sentence - Tenney J.

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77 CRIM. 0002

Form No. USA-331-274 (Ed. 9-25-53)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

ESAU SALONE and
PAUL SULLIVAN, a/k/a "Pablo,"

Defendants.

INDICTMENT

77 Cr.

In violation of Title 21, United States Code 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.

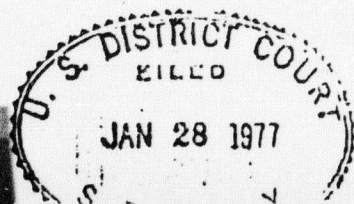
ROBERT B. FISKE, JR.

United States Attorney.

A TRUE BILL

Mark Hanger

Foreman.



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JUDG
January 28, 1977 - Filed indictment. *Pierre J.*

February 3, 1977 - Deft Salone present w/ atty Leonard Jay (Lizalard) present for arraignment proceedings only. Deft pleads not guilty. Bail fixed by Court - \$10,000 P.B. sec by \$1,000 cash - co-signed by brother.

Put Trial Service supervision until. Case assigned to Judge Tenny for all purposes.

Deft Sullivan present w/ atty Steven Russo. Deft pleads not guilty. Bail of \$25,000 P.B. sec by \$500 cash cont'd. Case assigned to Judge Tenny all purposes. *Pierre J.*

2/9/77 - ESAU SALONE - SIDNEY RABINOWITZ, Esq.
PAUL SULLIVAN - PAUL BOLDENBERG, Esq.
by LARRY DUBIN, Esq.

Pl. held 1 Conf. trial 4/18/77 at
D.A. 11. Tenny, J.

4/18/77 PAUL SULLIVAN
Attys (Deft present) JERRY FELDMAN

Deft w/d plea of not guilty to 1st & 2nd counts guilty to 3rd & 4th counts. *101*

INDICTMENT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

-v-

ESAU SOLONE

-----X United States District Court
For the Southern District of
New YorkCase No. 77 Cr 62Judge Tenney-----X
INDEX TO THE RECORD ON APPEALDOCUMENTS

Certified Copy of Docket Entries
Certified copy of Indictment
Affidavit of Henry Korn AUSA dtd: 4/19/77
Deft's request to charge
Govt's request to charge
W/H/C Ad Testificandum
Judgment and Commitment
Transcript record of proceedings dtd: 4/18/77
Notice of appeal
Clerk's Certificate

A-B

1
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667-1116

DISTRICT COURT DOCKET, ETC.

12a

14-27-77 Filed writ H/C had test for Ernest Sanders . writ satisfied
4/26/77 MacMahon J.

05-27-77 Filed Judgement (atty Sidney Craig) deft sent to 4yrs impr.
on cts 1,2, & 3 to run concurrently . Special Parole
3 yrs. Commitment recommendation , deft. to serve sent at FCI
at Danbury Conn. Tenney J. issued all copies.

06-01-77 Filed Notice of Appeal by deft Solore to the U.S.C.A
from the jdgmt of 5/27/77 m/n to U.S. Atty & defts atty
Deft application to proceed in forma pauperis & for transcript of the
of the trial is granted Tenney J.

3-31-77 FILED TRANSCRIPT OF PROCEEDINGS DTD: 4/12/77

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FINE AND RESTITUTION PAYMENTS			
DATE	RECEIPT NUMBER	C.D. NUMBER	DATE

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By *[Signature]* Deputy Clerk

DISTRICT COURT DOCKET, ETC.

13a.

CRIMINAL DOCKET - U.S. District Court

OFFENSE PD ☐ JUDGE/MAGISTRATE Assigned ☐ U.S.
 OFFENSE MO ☐ 0208 1 0844 vs.
 DEMEANOR MIS ☐ Dist. / Sentence (LAST FIRST MIDDLE)
 FELONY Fel ☒ District Office

SOLONE, ESAU

Case Filed
Mo Day
01 28
NO. of Dets
02

77 0062 01

JUVENILE

Docket No. 01

U.S. TITLE/SECTION
 21:846
 21:812, 841(a)(1)
 & 841(b)(1)(A)

OFFENSES CHARGED
 Consp. to violate Federal Narcotics Laws
 Distr. & possess. of Heroin, 1.

ORIGINAL COUNTS
 1
 2-3

6/1

SUPERSEDED
COUNTS

U.S. MAG
CASE NO.

BAIL - RELEASE
☐ AMT ☐ Fugitive
☐ Bond ☐ Pers. Recog
☐ PS4
☐ 10% Deposit
☐ Surety Bond
☐ Collateral
☐ 3-1
☐ Priv. Cust. ☐ Other

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT X	ARRAIGNMENT	TRIAL	SENTENCE
U.S. Custody begun 1-14-77 Summons Served First Appearance	High Risk Date 1-28-77 Indict Waived In Charging District Supervising Indict Info	2-3-77 2-3-77 First Appearance	Trial Set For 4-19-77 4-19-77 4-21-77	Disposition 4-21-77 X Convicted Acquitted Dismissed On Government Motion

MAGISTRATE		INITIAL NO.	OUTCOME
Search Warrant Issued Returned	DATE INITIAL NO.	INITIAL APPEARANCE DATE PRELIMINARY EXAMINATION OR REMOVAL HEARING NOT WANTED INTERVENING INDICTMENT	DISMISSED HELD FOR GOV. OF OTHER DISTRICT HELD FOR GOV. OF OTHER DISTRICT

U.S. Attorney or Ass't

ATTORNEYS

Defense ☐ CJA ☐ Ret. ☐ Waived ☐ Other ☐ PD ☐ PO

Jane W. Parver
 791-1916

* Show last names and suffix numbers of other defendants on same indictment information

Sullivan-02
 DATE DOCUMENT NO. PROCEEDINGS

1-28-77 Filed Indictment.....Pierce, J.

2-3-77 Deft. (atty. Leonard Joy, Legal Aid present for arraignment proceedings only) pleads not guilty. Bail fixed by Court at \$10,000 PRB secured by \$1,000 cash - co-signed by brother. Pre-Trial Service supervision continued. Case assigned to Tenney, J. for all purposes.....Pierce, J.

02-09-77 Deft. (atty. Sidney Craig, Esq.) pre-trial conf. held. trial 4-18-77 at 10AM. Tenney, J.

04-19-77 Filed Govts' affdvt. re: writ. of habeas corpus ad test. ret: 4-20-77.

04-22-77 Filed deft.'s request to charge.

04-22-77 Filed Govt's. request to charge.

04-19-77 Before Tenney J. Jury Trial begun as to deft Solone

04-20-77 Trial cont'd

04-21-77 Trial cont'd deft. found guilty on cts 1,2,&3 pre-sentence investigation ordered, sent. adj'd to

EXCLUDE E DELAY

2 2-9 E

A

-----X
UNITED STATES OF AMERICA

CASE NO. 77 Cr 62

-v-

JUDGE Tenney

ERAU SOLONE

CLERK'S CERTIFICATE

----- X
I, RAYMOND F. BURGHARDT, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the certified copy of docket entries lettered A- B, and the original filed papers numbered 1 thru 9, and exhibits _____, inclusive, constitute the record on appeal in the above entitled proceeding; except for the following missing documents:

DATE FILED

PROCEEDINGS

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 22nd day of June, in the year of our Lord, One thousand nine hundred and seventy seven, and of the Independence of the United States the 201st year.

Raymond F. Burghardt
Clerk of the Court

WHERE ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530
DATE: 6-22-77
BY: [Signature]
RE: [Signature]
U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

S. Korecki
Deputy Clerk

United States District Court for

Southern District of New York

United States of America vs. Esau Solone

DEFENDANT

77 CR. 62 (CHT)

DOCKET NO. ➔

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date ➔

MONTH DAY YEAR
May 27, 1977

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Sidney Craig, Esq.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☒ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY.

FINDING & JUDGMENT

Defendant has been convicted as charged of the offense(s) of unlawfully, intentionally and knowingly distributing and possessing with intent to distribute a Schedule I narcotic drug controlled substance, to wit, heroin. (Title 21, U.S. Code, Sections 812, 841(a)(1) and 841(b)(1)(A), Title 18, U.S. Code, Section 2.) unlawfully, wilfully & knowingly conspiring so to do. (Title 21, U.S. Code, Section 846.)

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4)

YEARS, on each of counts one (1), two (2) and three (3) to run concurrently with each other.

SENTENCE OR PROBATION ORDER

Pursuant to the provisions of Title 21, Section 841, U.S. Code, the defendant is placed on Special Parole for a period of THREE (3) YEARS, to commence upon expiration of confinement.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, that the defendant serve his sentence at the Federal Correctional Institution, Danbury, Connecticut.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

MAY 31 1977

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

Date

May 27, 1977

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Jun 1 3 52 PM '77

-----X
:
United States of America
vs
Esau Solone
:
:
-----X

Action Number 77 Cr. 62 CHT

NOTICE OF APPEAL

TO

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Esau Solone

Notice is hereby given that _____
above named, hereby appeals to the United States Court of
Appeals for the Second Circuit from the * _____ Judgment
May 27, 1977, 19____.

Signed

Joseph [Signature]
Attorney for DEFENDANT

Address

Notice to: Shemitz & Craig
276 Fifth Ave
New York New York

AUSA Henry H. Korn

Defendant's application to proceed
in forma pauperis and for transcript
of all or portions of the trial record,
Granted.

So Ordered.

* Insert whether order or final judgment:
or part thereof appealed from.

Charles [Signature]
U.S.D.J.

8

UNITED STATES OF AMERICA

INDICTMENT

77 Cr. 73

ESAU SOLONE and HAROLD JONES,

Defendants.

COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of October, 1976 and continuously thereafter up to and including the date of the filing of this Indictment, in the Southern District of New York ESAU SOLONE and HAROLD JONES, the defendants and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 341(a)(1) and 341(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 341(a)(1) and 341(b)(1)(A) of Title 21, United States Code.

BEST COPY AVAILABLE

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about November 23, 1976 the defendant ESAU SOLONE had a telephone conversation at the Interchange Cocktail Lounge, 172-04 Linden Boulevard, St. Albans, Queens, New York.

2. On or about November 30, 1976 the defendant ESAU SOLONE entered the building at 175 West 87th Street.

3. On or about November 30, 1976, at 87th Street and Amsterdam Avenue, New York, New York, the defendant HAROLD JONES banded another individual approximately 25.7 grams of heroin hydrochloride.

4. On or about November 30, 1976 in the vicinity of 175 West 87th Street, New York, New York, the defendants ESAU SOLONE and HAROLD JONES banded another individual approximately 130.4 grams of heroin hydrochloride.

(Title 21 United States Code, Section 846.)

COUNT TWO

JP:isk

The Grand Jury further charges:

On or about the 30th day of November, 1976, in the Southern District of New York, ESAU SOLCNE and HAROLD JONES, the defendants unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 130.4 grams of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

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United States District Court
SOUTHERN DISTRICT OF NEW YORK
THE UNITED STATES OF AMERICA

vs.

ESAU SOLONE and HAROLD JONES,

Defendants.

INDICTMENT

77 Cr.

**(21 USC, §§ 812, 841(a)(1),
841(b)(1)(A) and 846)**

ROBERT B. FISKE, JR.

United States Attorney.

A TRUE BILL

Foreman.

BEST COPY AVAILABLE

COMPANION CASE INDICTMENT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1299

UNITED STATES OF AMERICA,
Appellee,
-against-
Esau Solone
Appellant.

APPENDIX FOR APPELLANT ESAU SOLONE

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

VICTOR L. BRIZEL, ESQ.
Attorney for Appellant
79 Madison Ave.
New York, New York 10451
(212) 684-6088

1 MP

2

2 (In the robing room:)

3 THE COURT: How long is the Government's case?

4 MR. KORN: It should not take more than a day.

5 I think we will be able to finish the Government's direct
6 case by tomorrow at three o'clock, with cross-examination,
7 if we start at eleven.

8 THE COURT: I just wanted to tell the jury. We
9 should be finished by the end of the week, then.

10 MR. CRAIG: Judge, I should like to discuss some
11 of the evidence that Mr. Korn wants to interpose. He wants
12 to bring in evidence of prior sales.

13 MR. KORN: And subsequent sales. I gave you a
14 memorandum of law.

15 MR. CRAIG: I am of the opinion that these prior
16 sales and subsequent sales cannot be introduced unless
17 there is a conviction. The mere fact that there was an
18 arrest and no conviction, there was just a sale and nothing
19 was ever done about it --

20 THE COURT: No; that is not the way the law reads,
21 so I will have to admit them for the limited purpose, with
22 an instruction to the jury that sales have been charged as
23 taking place, and --

24 MR. CRAIG: He was never charged with those sales.
25 They are not part of the overt acts.

3

1 MP

2 THE COURT: That still does not affect the situation
3 The matter is clearly relevant, as I said, to show intent
4 and to negate, of course, the defense of entrapment, which
5 you indicate is going to be raised. So I would have to per-
6 mit that.

7 MR. CRAIG: The only reason I bring it up at this
8 time is that I would rather have a ruling at this time.

9 THE COURT: I don't blame you. I would have tried
10 it myself, but surely you didn't expect to be successful.

11 MR. CRAIG: No, sir.

12 THE COURT: All right.

13 (In open court:)

14 (Recess, during which another matter was heard.)

15 (A jury was duly impaneled and sworn.)

16 (Two alternate jurors were duly selected and sworn.)

17 THE COURT: Ladies and gentlemen, I know that
18 quite a few of you have had some experience of sitting on
19 juries, so that what I am about to say will not be new to
20 you, and it is directed to those who have not had that ex-
21 perience.

22 What I am about to say will serve as sort of an
23 introduction to the trial of the case. Of course, it is not
24 a substitute for the detailed instructions as to the law
25 and the evidence, which I will give you at the close of the

1 LZpa

272

2 Direct proof is unnecessary. Knowledge and
3 intent may be inferred from all the surrounding
4 circumstances.

5 I mentioned to you and instructed you
6 during the course of the trial with respect to testimony
7 and evidence regarding the sales of narcotics which
8 preceded or in one case followed the sales that are
9 charged in the indictment itself, namely the sales
10 on April 27th and June 23, 1976, which are the subject
11 of counts two and three. I told you that assuming
12 you found that these sales took place on those last
13 two dates that I mentioned, then for a limited purpose you
14 could consider the other sales. I will repeat those
15 instructions to you.

16 Evidence that an act was done at one time
17 or on one occasion is not any evidence or proof whatever
18 that a similar act was done at another time or on another
19 occasion. That is to say, evidence that a defendant may
20 have committed an earlier act of a like nature may not
21 be considered by you in determining whether the accused
22 committed any act charged in the indictment.

23 However, if you should find beyond a
24 reasonable doubt from other evidence in the case that the
25 defendant did the act charged in the particular count under

1 L2pa

273

2 deliberation, namely counts two and three, and on the
3 dates specified in those counts, then you may consider
4 evidence as to an alleged earlier act of a like nature
5 in determining the state of mind or intent with which the
6 defendant did the act charged in the particular
7 count. And where proof of an alleged earlier act of a
8 like nature is established by evidence which is clear
9 and conclusive, you may but are not obliged to draw
10 the inference and find that in doing the act charged
11 in the particular count under deliberation, the defendant
12 acted willfully and with specific intent and not because
13 of accident or mistake or other innocent reason.

14 The third element that you must find in
15 connection with counts two and three is that the
16 drug that was transferred is a narcotic drug controlled
17 substance. The indictment charges the narcotic drug
18 controlled substance is heroin and I instruct you
19 as a matter of law that heroin is a narcotic drug
20 controlled substance.

21 You, however, must still find beyond a
22 reasonable doubt that the substance is heroin as charged
23 in this specific count. You must be convinced beyond
24 a reasonable doubt that the substance distributed or
25 possessed was in fact a narcotic drug.

LZpa

274

There is testimony in this case, indeed, there are government exhibits in evidence in connection with statements the government alleges were made by the defendant during the course of the telephone conversation on June 16, 1976. Now, as I mentioned to you at the time, you are not bound by the transcript prepared by the government. The transcript is not evidence in this case. It is provided you only to aid you in listening to the tape recording. It's the tape recording that is evidence. It is your understanding of what you hear on the tape recording that controls and not what is in the transcript.

Returning briefly to counts two and three, it's not necessary for the government to show in each of the substantive crimes in counts two and three that the defendant Solone physically committed the crime himself. The United States code provides that a person who aids and abets another to commit an offense is just as guilty of that offense as if he committed it himself. Accordingly, you may find the defendant guilty of the offenses charged in counts two and three if you find beyond a reasonable doubt that Paul Sullivan committed the offense, for example, but that the defendant aided and abetted him.

1 LZpa

275

2 In order to aid and abet another to
3 commit a crime, it's necessary that the accused willfully
4 associated himself in some way with the criminal venture
5 and willfully participated in it as he would in
6 something he wishes to bring about. That is to say,
7 that he willfully sought by some act or omission of his
8 to make the criminal venture succeed. To determine
9 whether the defendant aided and abetted the commission
10 of the crime, you ask yourselves these questions:

11 Did he associate himself with the venture?
12 Did the defendant participate in it as something he wished
13 to bring about? Did he seek by his actions to make it
14 succeed? If the defendant did, then the defendant is
15 an aider and abettor.

16 There has been testimony before you with
17 respect to the use by the government of the services of
18 an informant or an informer. Whatever one thinks of
19 informants, the government uses them in order to get
20 leads about those who are violating the law. Whether one
21 disapproves of this is really beside the point, provided
22 that such services do not impinge upon the rights of the
23 defendant, because the use of such services is not forbidden
24 by law. You are not being asked to determine whether or
25 not you agree with the policy endorsing the use of

1 LZpa

276

2 informants. Putting it another way, if you are
3 satisfied beyond a reasonable doubt, as I have already
4 defined reasonable doubt to you, that on the date and
5 at the place with which we are concerned the defendant
6 committed the offenses charged in the indictment, you
7 must find him guilty even though you believe his apprehension
8 came about in some measure by the government availing
9 itself of the services of an informer.

10 The defendant asserts as a defense to the
11 charge that he was the victim of entrapment by an
12 agent of the government. And so I will speak to you
13 briefly about entrapment. The word entrapment, that
14 I have just used, is a legal term. It has a technical
15 meaning, not that of popular speech or colloquial or
16 ordinary usage, so I will explain the word and meaning
17 of "entrapment" as it is used in the law.

18 A basic feature of entrapment is that the
19 idea or design of committing the crimes originate with
20 a law enforcement officer rather than with the defendant.
21 That the defendant had no disposition, intent or purpose
22 to commit the alleged offenses and that the law enforcement
23 officer or government employee implanted in the mind of
24 an innocent person a disposition to commit the alleged
25 offense and instigated and incited its commission in order

1 LZpa

277

2 that the defendant might be arrested and prosecuted.

3 Where a person has no previous intent or purpose to violate
4 the law but is induced or persuaded by law enforcement
5 officers or their agents to commit a crime, he is the
6 victim of entrapment and the law as a matter of policy
7 forbids his conviction in such a case.

8 If you find that an agent or employee of
9 the government merely afforded a favorable opportunity
10 or facilities to the defendant for the commission of
11 the alleged crime, such conduct on the part of the
12 government does not constitute entrapment. Entrapment
13 would occur only if you find that the defendant lacked
14 the predisposition to commit the alleged offense and
15 that the government agent actually implanted the criminal
16 design in the mind of the defendant.

17 If you find any credible evidence creating
18 the reasonable possibility that a government agent or
19 employee instigated or incited or otherwise induced the
20 defendant to commit the crimes charged, then the government
21 must prove beyond a reasonable doubt that such inducement
22 was not the cause or creator of the crime, that is,
23 that the defendant was predisposed and willing to commit
the crimes. If the prosecution has satisfied you
25 beyond a reasonable doubt that the defendant was ready and

1 LZpa

278

2 willing to commit the offenses charged but was awaiting
3 a favorable opportunity to commit the offense, then
4 you may find that the inducement, if any, which brought
5 about the actual offense was not more than the providing
6 of what appeared to the defendant to be a favorable
7 or timely or convenient opening or facility for the
8 criminal activity in which that defendant may have
9 preferred to engage, and in such circumstances you may
10 find that the government's agent has not seduced an
11 innocent person or persons but has only provided the
12 means for the defendant to effectuate or realize his
13 own then-existing purpose.

14 I have already instructed you that evidence
15 of similar criminal acts not mentioned in the
16 indictment may be considered by you in determining whether
17 the defendant possessed the requisite state of mind or
18 intent to do the acts charged in the indictment.

19 In this regard, prior or subsequent
20 similar acts may be some evidence that the defendant acted
21 willfully and knowingly with specific intent on the
22 occasions named in the indictment and not because of a
23 mistake.

24 Prior or subsequent similar acts may also
25 be weighed by you in considering the defendant's claim

1 LZpa

279

2 that he was unlawfully induced or entrapped by the
3 government agents into committing those acts charged in
4 the indictment. Since the defendant raised the
5 defense of entrapment claiming that he had no previous
6 intent or purpose to violate the law but was the victim
7 of entrapment, you may consider prior and subsequent
8 similar acts as some evidence that the defendant was
9 predisposed to commit the alleged criminal acts
10 charged in the indictment.

11 There are two types of evidence which a jury
12 may properly rely on in deciding the guilt or innocence
13 of the accused. The first is direct evidence such as
14 the testimony of a witness relating to what he heard or
15 saw, something he knows through his own knowledge which
16 bears directly on the fact issue in the case.

17 For example, testimony by a witness that
18 he saw a defendant in possession of an object is
19 direct evidence which, if believed by the jury, establishes
20 the fact that the defendant had possession of the object.

21 The other type of evidence is circumstantial
22 evidence, which is proof of a fact or circumstance through
23 which one may interconnect facts which reasonably follow
24 a man's common experiences.

25 Circumstantial evidence is that evidence

1 I.Zpa
2 which tends to prove a disputed fact through proof of other
3 facts. To use a very simple example, if you look out
4 the window and see it raining, then your statement that
5 you see the rain coming down is direct evidence that
6 it's raining. Instead of looking out of the window,
7 you see a succession of people coming inside, each with
8 raincoats and umbrellas and everybody dripping wet,
9 then your statement as to that observation is
10 circumstantial evidence of the fact that it is raining.

11 Circumstantial evidence is of no less value
12 than direct evidence. As a general rule, the law
13 makes no distinction between direct and circumstantial
14 evidence but simply requires that before convicting a
15 defendant, the jury be satisfied of the defendant's
16 guilt beyond a reasonable doubt from all the evidence
17 in the case.

18 There are times when different inferences
19 may be drawn from a certain set of facts. An inference
20 is a deduction or conclusion which the jury is
21 permitted to draw from facts which have been established
22 by either the direct or circumstantial evidence
23 introduced in the case. An inference is not drawn by
24 speculation or guesswork but rather arrived at by an
25 exercise of your reason and common sense, so while

1 L.Zpa

281

2 considering the evidence presented, you are permitted
3 to draw from the facts which you find to have been
4 proven such reasonable inferences as seem justified
5 in the light of your experience. Here again, let me
6 remind you that whether based on direct or circumstantial
7 evidence or the logical, reasonable inferences
8 drawn from such evidence, you must be satisfied of the
9 guilt of the defendant beyond a reasonable doubt.

10 As I mentioned to you at the commencement
11 of these instructions and in my remarks to you
12 after you were chosen as jurors, you are the sole judges
13 of the credibility and truthfulness of witnesses. Of
14 course, in weighing the testimony of each witness you
15 should consider his relationship to the government, the
16 extent of the witness' interest, if any, in the outcome
17 of the case, his manner of testifying, his appearance
18 and conduct while on the stand, his intelligence, the
19 strength or weakness of his recollection and the
20 extent to which he has been corroborated or contradicted,
21 if at all, by the other credible evidence.

22 The ultimate question for you to decide in
23 passing upon the credibility of a witness is that
24 the witness tell the truth and to this end you are to
25 use your everyday common sense. If you find that any

1 IZpa

282

2 witness has deliberately testified falsely to any
3 material fact, you may disregard all of his testimony
4 or you may accept that part of his testimony which you
5 believe is truthful or which you find to be
6 corroborated or supported by other evidence in the case.

7 The law permits but does not require a
8 defendant to take the stand in his own behalf. In
9 this case the defendant took the stand. Obviously he
10 has a deep personal interest in the result of his
11 prosecution. The greater the interest, the stronger
12 the motive and a defendant's interest in the result
13 of a trial is of a character possessed by no other
14 witness. So in appraising a defendant's credibility,
15 you may take his interest in the outcome into
16 consideration.

17 However, I want to point out that it by no
18 means follows simply because a person has a vital
19 interest in the end result that he is not capable of
20 telling a truthful and straightforward story. It's for
21 you to decide to what extent, if any at all, his interest
22 has colored his testimony.

23 Both of the witnesses called by the
24 prosecution were and are employees of the federal or
25 state government. That they are engaged in the service

283

1 LZpa

2 of the government does not mean that you are required
3 to give any greater weight to their testimony than that
4 of any other witness. You appraise their testimony by
5 the same standards applied to any other witness to
6 determine their credibility, taking into account the
7 interest or any other factor which may have influenced
8 them to color their story one way or another.

9 The attorneys in this case have entered into
10 certain stipulations, particularly with respect to the
11 analysis of certain of the exhibits, the analysis of
12 the drugs and of course stipulations are binding on
13 the parties who agree to them.

14 When attorneys stipulate or agree as to
15 the existence of a fact, you must, unless otherwise
16 instructed, accept the stipulation and regard the
17 fact as proved. I would point out that the stipulation
18 merely recited what the person would have testified
19 to had he been called as a witness, namely the
20 chemist. And this was for the purpose of avoiding
21 the necessity of calling the chemist as a witness.

22 As I mentioned earlier in my remarks to
23 you, anything that counsel either for the government or
24 for the defense may have said with respect to matters
25 in evidence, whether during the trial, in argument or in

288

1 LZpa

2 to the testimony of Agent Carrol. Does the defense attorney
3 agree that this material was turned over at these
4 dates?

5 MR. CRAIG: I do agree.

6 (At 4:23 P.M. a note was received
7 from the jury.)

8 (Court's Exhibit 1 marked.)

9 (Jury present.)

10 THE COURT: I have a note from the jury
11 saying, "Please give a definition of entrapment."

12 I'll give you the instruction I gave you
13 earlier today with some expansion which may be of help
14 to you.

15 The defendant asserts as a defense to the
16 charge, that he was the victim of entrapment by an
17 agent of the government. The word "entrapment" that
18 I have just used is a legal term. It has a technical
19 meaning, not that of popular speech or colloquial, ordinary
20 usage. Therefore, I must explain the word and meaning
21 of "entrapment" as it is used in the law.

22 Criminal activity is such that sometimes
23 stealth and strategy are necessary methods to be used by
24 law enforcement officers. The function of law enforcement
25 is not only the prevention of crime but also the detection and

1 l.Zpa

289

2 apprehension of criminals. Manifestly, that function
3 does not include the manufacturing of crime. The defense
4 of entrapment is based upon the policy of the law not
5 to ensnare or entrap innocent persons into the commission
6 of a crime. But a line must be drawn between the entrapment
7 of the unwary innocent and the trap of the unwary
8 criminal. A basic feature of entrapment is that
9 the idea or design of committing the crimes originated with
10 a law enforcement officer rather than with a defendant;
11 that the defendant had no disposition, intent or
12 purpose to commit the alleged offenses; and that
13 the law enforcement officer or the government employee
14 implanted in the mind of an innocent person a disposition
15 to commit the alleged offense and instigated and incited
16 its commission in order that the defendant might
17 be arrested and prosecuted.

18 Where a person has no previous intent
19 or purpose to violate the law, but is induced or persuaded
20 by law enforcement officers or their agents to commit
21 a crime, he is the victim of entrapment and the law as
22 a matter of policy forbids his conviction in such a case.

23 If you find that an agent or employee of
24 the government merely afforded a favorable opportunity
25 or facilities to the defendant for the commission of the

1 L2pa

290

2 alleged crime, such conduct on the part of the government
3 does not constitute entrapment. Entrapment would occur
4 only if you find that the defendant lacked the predisposition
5 to commit the alleged offense and that the government
6 agent actually implanted the criminal design in the mind
7 of the defendant.

8 If you find any credible evidence creating
9 the reasonable possibility that a government agent
10 or employee instigated and incited or otherwise
11 induced the defendant to commit the crimes charged,
12 then the government must prove beyond a reasonable doubt
13 that such inducement was not the cause or creator of
14 the crime, that is, that the defendant was predisposed
15 and willing to commit the crime.

16 If the prosecution has satisfied you beyond
17 a reasonable doubt that the defendant was ready and willing
18 to commit the offense charged, but was awaiting a
19 favorable opportunity to commit the offense, then you
20 may find that the inducement, if any, which brought
21 about the actual offense was not more than the
22 providing of what appeared to the defendant to be a
23 favorable or timely or convenient opening or facility
24 for the criminal activity in which that defendant may have
25 preferred to engage; and, in such circumstances,

1 I.Zpa

291

2 you may find that the government's agent has not
3 seduced an innocent person or persons but has only
4 provided the means for the defendant to effectuate
5 or realize his own then-existing purpose.

6 Then I mentioned to you the fact that
7 prior or subsequent similar acts may be weighed by
8 you in considering the defendant's claim that he was
9 unlawfully induced or entrapped by the government, its
10 agents into committing those acts charged in the
11 indictment and that since the defendant raised the
12 defense of entrapment claiming that he had no previous
13 intent or purpose to violate the law but was the victim
14 of entrapment, you may consider prior and subsequent
15 similar acts as some evidence that the defendant was
16 predisposed to commit the alleged criminal acts.

17 I believe that's all that I have
18 to say on entrapment.

19 As I indicated to you yesterday, I have
20 to leave around shortly before five o'clock. This is
21 not in any sense urging you to reach a verdict. Take
22 all the time you need. But I will have to excuse you
23 shortly before five and ask you to come back at ten
24 tomorrow morning.

25 All right.